No. 80-15
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Supreme Court of the United States

OCTOBER TERM, 1980

AMOCO PRODUCTION COMPANY and
MARATHON OIL COMPANY,
Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, TREASURER OF THE JICARILLA APACHE TRIBE, and CECIL ANDRUS, Secretary of the Interior,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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I. THERE HAS BEEN NO "SHARED PRESUMPTION" THAT INDIAN TRIBES MAY TAX PRODUCTION BY MINERAL LESSEES UNDER EXISTING LEASES. THE LIMITED NATURE OF THE TRIBE'S SOVEREIGNTY PRECLUDES SUCH A POWER.[1]

Respondents contend that this Court in *Colville*, 447 U.S. 134 (1980), foreclosed any objection to tribal taxation, and that Indian tribes possess a general inherent power to tax nonmembers on the reservation.[2] But contrary to Respondents' claim of a "shared presumption" of the existence of such power, tribes have not heretofore asserted, nor has this Court or the Executive countenanced, Indian taxes on nonmembers other than "permit taxes" imposed as a condition of entry. Those differ fundamentally from a severance tax imposed upon nonmembers already on the reservation pursuant to Tribal leases, approved by the Secretary, which fix the compensation payable to the Tribe.[3] The expanded notion of sovereignty advanced by the Tribe is a novel effort to circumvent its contractual obligations, and must be rejected.

A. Contrary to Respondents' contentions (Sec. Br. 8-9; Jic. Br. 12-13), the Court's decision in *Colville* is not dispositive.[4] As pointed out in our opening brief (at 8-10), the tribal power to tax recognized in *Colville* was grounded solely upon the traditional power of tribes to exclude nonmembers from the reservation, or to attach conditions to their entry. Nothing cited by the Secretary or the Tribe alters this conclusion. Indeed, the 1879

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[1] Because of its length, the listing required by Rule 28.1 is contained in the Appendix to this brief.

[2] *See* Brief for the Secretary of the Interior ("Sec. Br.") at 8-18; Brief for Respondent Jicarilla Apache Tribe ("Jic. Br.") at 10-21.

[3] *See* our opening brief, at 9-10.

[4] The unlimited grant of certiorari here is hardly consistent with the suggestion that this case is "foreclosed" by *Colville*.

Senate Report[5] upon which the Secretary relies (Sec. Br. 10-11) directly supports Petitioners' view that tribes were empowered to set the terms and conditions of entry upon the reservation by prospective intruders only through a process of "contract[ing]," rather than by the imposition of a general tax.[6] The observations of this Court[7] and of the Senate Report that license or permit fees imposed by the tribes also serve to increase tribal revenues hardly constitute approval of a tax not imposed as a condition of entry, and cannot be construed to mean that the effect on tribal revenues determines the validity of the tax.

The principal authority cited by Respondents for the proposition that tribal taxation of nonmembers may exist apart from the power to exclude is *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). (Sec. Br. 11, 15-16; Jic. Br. 14-16). But the Creek tax upheld in *Buster* was an annual "permit or license" fee imposed for the privilege of transacting business within the reservation; unlike the Jicarilla, the Creek were not asserting a general taxing power. Instead, the source of the Creek taxing power challenged in *Buster* was rooted in the power to exclude. When Congress in 1902 prohibited the *removal* of nonmember landowners from the reservation, it neither undercut nor enlarged the tribe's powers,[8] inasmuch as the Attorney General had previously ruled (23 Op. Att'y Gen. 214, 219

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[5] S. Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879).

[6] The Report considered a Chickasaw law which prohibited nonmembers from renting land or procuring employment within the reservation unless they contracted with a Chickasaw and obtained an annual permit. The "tax" was a $25.00 annual fee for the permit. The sole remedy available against nonmembers who failed to comply with prescribed conditions of entry was to order the offender to leave the reservation.

[7] *Morris* v. *Hitchcock*, 194 U.S. 384, 389 (1904).

[8] The Secretary's contention that a tribe's power to tax nonmembers exists regardless of its power to "remove" them is inappropriate (Sec. Br. 16). It has never been established or even

(1900)) that federal authorities could close the businesses of nonmembers who failed to pay the tax. Just as the tribe's permit laws formerly had been enforced by excluding offenders from the reservation, the power remained to close the businesses of merchants who refused to pay the permit fee. In the context of an occupation tax, this power to exclude from the reservation's business community is the functional equivalent of the power to exclude the physical presence of nonmembers from the reservation. There was no suggestion in *Buster* that the Tribe could compel payment of the tax from recalcitrant merchants or wield any of the other enforcement powers that normally inhere in a sovereign taxing authority. Thus, *Buster* does not support an expansive reading of tribal taxing authority.

Nor can the Indian Reorganization Act be invoked as recognition of the inherent authority of tribes to exercise powers of general taxation. (*See* Sec. Br. 11; Jic. Br. 22-24). Without mentioning taxation, the IRA simply confirmed powers granted by "existing law." In the case of nonmembers, as *Colville* indicates, "existing law" permitted taxes which could be attached as conditions for "entering the reservation to engage in economic activity." [9] Nothing advanced by Respondents supports any broader reading of "existing law." [10]

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suggested that a tribe's power to *exclude* nonmembers, or attach conditions to their entry, is coterminous with a putative power to remove. Indeed, as *Buster* makes clear, the power to remove an intruder already on the reservation has almost always been exercised by the federal government acting through its Indian agents, not by the tribes.

[9] *See* 447 U.S. at 153. In support, the Court quoted the Solicitor's opinion that taxing power may be exercised over nonmembers "so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." 55 I.D. 14, 46 (1934). The Solicitor was careful to note that such conditions could not "infringe any vested rights of persons now occupying reservation lands under lawful authority." *Id.* at 50. *See also* 1 Sol. Int. Op. 873, 876 (1939).

[10] As the Secretary correctly admits (Sec. Br. 34-35), the Natural Gas Policy Act of 1978 neither grants nor confirms Indian

B. Apart from their reliance on the "permit tax" cases, Respondents also contend that Indian tribes possess all sovereign powers not specifically denied them by Congress or this Court. But this Court has consistently held that Indian tribes do not possess the full attributes of sovereignty enjoyed by the states.[11] The "attributes" of Tribal sovereignty relevant here—the power of self-government, which by definition precludes governing nonmembers, *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 147 (1810), and the territorial power of exclusion[12]—cannot support the Tribe's severance tax. None of the "platonic notions of Indian sovereignty" invoked by Respondents, *see McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 (1973), can alter the fact that the power to tax non-Indians is rooted solely in the power to exclude. Tribal "sovereignty" in the territorial sense can mean no more than the power to impose conditions of entry, as the Tribe has done here in its leases. By signing the leases, the Tribe explicitly surrendered the one relevant sovereign power it possessed—the power to exclude Petitioners from entering the Reservation, and to

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power "to impose severance taxes on petitioners." The Conference Report makes clear that Congress did not endorse tribal severance taxes; it merely recognized the existence of such taxes and left the question of their legality to this Court. *See* H.R. Rep. No. 1752, 95th Cong., 2d Sess. 91 (1978).

[11] *United States* v. *Kagama*, 118 U.S. 375, 381-82 (1886), quoted in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973). *See also* our opening brief at 10-13.

[12] Treaties generally recognized the right to exclude nonmembers. *See, e.g.*, II Kappler, *Indian Affairs, Laws and Treaties* (1904) (hereinafter "Kappler") 7, 9, 12, 15, 17, 20, 21, 27, 30, 42, 75, 225, 228, 230, 233, 235, 237, 240, 242-43, 245, 256, 258, 261, 312, 418, 682, 699, 703, 719, 761, 774, 779, 790, 794, 797, 800, 808, 866, 886, 888, 893, 929, 985, 990, 998, 1008, 1016, 1021. Those exclusionary provisions have not been regarded as vesting Indians with jurisdiction over nonmembers. *See Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 198 n. 8 (1978). No distinction has been made, insofar as the right to exclude is concerned, between tribes occupying treaty reservations and those whose reservations were established by Executive Order.

impose conditions on that entry other than the conditions imposed by the leases.[13]

The Tribe's powers are not enlarged by the asserted need for revenues. If tribal revenues from oil and gas leases are insufficient to recover the costs of tribal services, the United States as trustee can act to remedy the situation. Its failure to do so may stem from the fact that the rental and royalty income received by the Jicarilla Tribe is more than sufficient to support the entire operation of the tribal government.[14]

Finally, the severance tax cannot be justified by any claim that the Tribe "owns" the minerals underlying the Reservation,[15] and it should not be used as a device to

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[13] This critical difference between the limited sovereignty possessed by tribes, and the sovereign power of states to tax all persons and property within their jurisdiction, rebuts Respondents' contentions (Sec. Br. 13-14; Jic. Br. 21-22) that the Tribe should be permitted to levy a tax on mineral production because states arguably may increase severance taxes on production from state leases. As previously noted, tribes may "not infringe any vested rights of persons now occupying reservation lands under lawful authority." 55 I.D. at 50.

[14] Although Respondents argue (Jic. Br. 48-50; Sec. Br. 14) that the tax is justified by the Tribe's need for additional revenues, in part to offset expenditures allegedly incurred on behalf of Petitioners, no factual predicate for such an assertion appears in the record. The Tribe's answers to interrogatories admitted in evidence below (Pl. Exh. E, p. 7, Tr. Vol. VI, p. 269) reveal that the Tribe received $3,995,469.69 in oil and gas royalties in 1976. This figure is greater than the $3,958,201 tribal budget for fiscal 1976 (Jic. Br. 7) which included expenditures of $2,191,434 for "economic development," "per capita distribution," and "advances to tribal enterprises." While this may compare calendar year royalty revenues with fiscal year expenditures, it is apparent that the oil and gas royalty income is more than enough to support the entire tribal government.

The fact that the Jicarilla receive such substantial revenues from Petitioners should allay any fear (*see* Sec. Br. 14) that the Tribe will be reduced to collecting revenues only from "transient cigarette purchasers" fortuitously found on the Reservation.

[15] The United States retains title to the Jicarilla Reservation, which was created by executive orders. Although we agree with

renegotiate the leases.[16]

It is not surprising that the energy crisis has spawned attempts by tribes to tax and regulate [17] scarce resources underlying their reservations. But Respondents have wholly failed to demonstrate that such powers have been exercised or sanctioned in the past; and more importantly, they set forth no reason why such unprecedented tribal authority over nonmembers should be allowed today. The plain fact is that the limited sovereignty enjoyed by the Jicarilla Tribe does not admit of the broad powers it seeks here to exercise.

II. THE TRIBE HAS BEEN DIVESTED OF ANY RESIDUAL POWERS OF TAXATION.

Respondents' argument that the Tribe's taxing power has not been divested rests primarily on their claim of a

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the Secretary's contention (Sec. Br. 17-18) that the Reservation's executive order status does not diminish the Tribe's powers of self-government, or power to exclude nonmembers, it does foreclose any argument that the right to tax arises because "their" resources are being depleted. Their right of occupancy can be terminated without compensation. *See* our opening brief at 14, 18. The Jicarilla's entitlement to rentals and royalties from leasing the resources underlying the Reservation springs, not from any concept of aboriginal ownership, but solely from congressional grant expressed in the Act of March 3, 1927 (25 U.S.C. § 398b (1976)). The aboriginal lands of the Jicarilla are not included in the Reservation; the Tribe has already been compensated for such lands through the Indian Claims Commission. *See* 12 Ind. Cl. Comm. 439, 470 (1963), 17 Ind. Cl. Comm. 338 (1966); 25 Ind. Cl. Comm. 227 (1971).

[16] This severance tax is an effort to circumvent the provisions of existing leases prohibiting increases in royalties. *See* J.A. 27 and our opening brief at 3. Respondents apparently deem the present royalty provisions inadequate (Sec. Br. 12, 14-15; Jic. Br. 50), although the royalty is based on a percentage (12½%) of the value of production, *see* J.A. 24, and Tribal royalty income can only be expected to increase with deregulation.

[17] Contrary to the assertions in their oppositions to the petitions and in their briefs below to the effect that the severance tax is a necessary "sovereign tool" to restrict depletion of resources (*see* our opening brief at 26-27 n. 34), the Tribe now claims that "the power to regulate is not at issue in this case", Jic. Br. 47, and the Secretary omits any mention of the regulatory effect of the tax.

"shared presumption" that Indian tribes have a general power to tax their mineral lessees that is not dependent upon the power to exclude. That claim is wrong (*see* Part I), and so is the resulting argument.

A. Respondents mistakenly rely (Sec. Br. 18, Jic. Br. 35) on the lack of any specific reference to Indian severance taxes in the Act of March 3, 1927, and the other statutes authorizing state severance taxes on various kinds of Indian lands.[18] If there were such a general Indian power to levy severance taxes on non-Indian lessees, and if Congress intended to have it exist in parallel with the power expressly granted to the states, surely some mention would have been made of it.[19] Instead, the lack of any reference to Indian severance taxes refutes the notion that there is a "shared presumption" of any such Indian taxing authority that survived the consistent

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[18] The statutes are listed at p. 21 (Sec. Br.) and discussed at pp. 16-23 of our opening brief.

[19] The lack of mention of Indian severance taxes cannot be explained by the Secretary's suggestion that the "most natural explanation" for giving taxing authority to the states was to avoid the effect of the federal instrumentality doctrine (Sec. Br. 22). If that were so, it is puzzling that no reference was made either to Indian severance taxes or to the impact of the instrumentality doctrine on the rights of Indians, particularly since the doctrine rested on the concept that a "tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them." *Indian Oil Co.* v. *Oklahoma*, 240 U.S. 522, 530 (1916). It is also strange that the demise of the federal instrumentality doctrine 30 years ago (Sec. Br. 22 n.16), which rendered lessees of Indian lands subject to full state taxation, prompted neither attempts by the tribes to assert their supposed severance taxing powers nor even any discussion of such a possibility until now.

If Congress had intended to allow Indian taxes on mineral lessees, it could have provided for taxes for the benefit of the Indians as it did in 1901 for rights of way—*see* 25 U.S.C. §§ 319, 321 (1976). Significantly, these statutes allow taxes for "the Indians" *only* where the states do not tax, suggesting an intent to avoid conflicts which must arise where tribes and states seek to tax the same federally licensed activity.

course of congressional action.[20] This conclusion is particularly true of the 1927 Act which settled the controversy over the status of Executive Order reservations by giving the royalty interest to the Indians, and the severance taxing power (including power to tax the Indians' share) to the states.[21]

Respondents cannot avoid this conclusion by attempting to minimize the controversy attending passage of the 1927 Act and the balance it struck in settlement. The Act's sponsors correctly described the bill as "an attempt to compromise conflicting opinions as to how to develop the oil and gas resources" underlying the vast surfaces of Executive Order reservations, instead of leaving the conflict to be resolved by the *Harrison* litigation, then pending in this Court, which might leave the Indians with nothing.[22] Moreover, contrary to Respondents' con-

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[20] The lack of reference to Indian severance taxes also calls for application of the normal rule of statutory construction that double taxation cannot be inferred "in the absence of clear and unambiguous expression." Sutherland, *Statutory Construction* § 66.01 at 180 (4th ed. 1974). *See also id.* at §§ 47.23, 47.25.

[21] This conclusion is not affected by the fact that the tax provisions of the 1927 Act were drawn from the 1924 Act granting to the states the power to tax leases on treaty reservations (Sec. Br. 20-21). Although the question is not presented in this case, we do not concede that Indian tribes have a power which survived the 1924 Act to impose severance taxes on treaty reservations. Instead, we submit that, regardless of what kind of Indian reservation is involved, the power to tax non-Indians rests on the power to exclude and cannot be asserted against persons like Petitioners who have been admitted pursuant to valid leases.

[22] H.R. Rep. No. 763, 69th Cong., 1st Sess. 3, 6-9 (1926); *see also* S. Rep. No. 768, 69th Cong., 1st Sess. 6 (1926); S. Rep. No. 1240, 69th Cong., 2d Sess. (1927); H.R. Rep. No. 1791, 69th Cong., 2d Sess. (1927).

The impetus for the Act was not "an apparent lacuna in the law," as the Secretary suggests (Sec. Br. 24). Rather, as the cited reports show, the Act was prompted by the district court decision in the *Harrison* case which rejected Attorney General Stone's opinion and sustained Secretary Fall's view that the United States owned full title to Executive Order Indian reservations and could lease them without paying anything to the tribes. As the sponsors

tentions, there was substantial opposition to the 1927 Act, both from Congressmen who believed that the issue should be decided by this Court in the *Harrison* appeal and from those who argued that Executive Order reservations should be treated as public lands.[23] A fair reading of the legislative history shows that the 1927 Act was, as we contend, a carefully crafted compromise resolving a complex controversy in a way totally inconsistent with any notion that the Indians had a retained and unmentioned power to levy severance taxes in addition to exacting rents and royalties.[24]

The continuing vitality and preclusive effect of the 1927 Act were recently recognized in the Final Report of the American Indian Policy Review Commission, created by Congress "to conduct a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal Government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians." Pub. L. 93-580, 88 Stat. 1910 (1975). The Commission asserted that state severance taxes inhibit tribal economic development and recom-

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anticipated, the *Harrison* litigation was dismissed upon passage of the 1927 Act, 273 U.S. 782 (1927).

The concern that the Indians might receive nothing from litigation was justified. When the question of the status of Executive Order reservations eventually reached this Court in the *Sioux* case, it was held that the Indians were not entitled to compensation for termination of an Executive Order reservation. 316 U.S. 317 (1942). *See also* our opening brief at 14-15, 18.

[23] *See, e.g.*, the minority reports in H.R. Rep. No. 763 and H.R. Rep. No. 1791, *supra*.

[24] The fact that Congress did not establish the amount of royalties or the level of state taxation does not detract from the significance of its allocation of benefits between the states and the Indian tribes, as Respondents suggest (*e.g.*, Sec. Br. 31). Because of the impact which Indian severance taxes must have upon state taxation, the balance struck by Congress would be meaningless if the tribes also possess the same right to impose severance taxes as was granted to states. *See* our opening brief at 24 and the *amici* brief of New Mexico and other states at 2-3, 11.

mended the repeal of all federal statutes authorizing their imposition (including both the 1927 Act for Executive Order reservations and the 1924 Act for treaty reservations) so that the Indians may levy severance taxes.[25] For this and the other reasons stated in our opening brief (at 22-23), there is no merit in the Tribe's claim (Jic. Br. 33) that the 1927 Act was repealed in 1938. The Secretary does not join in this claim (Sec. Br. 23 n. 16, 45), and a similar claim was recently rejected in *Blackfeet Tribe of Indians* v. *Montana*, No. CV-78-61-GF (D. Mont. Jan. 6, 1981).

The foregoing and the silence of over 40 years combine to show that the 1927 Act divested whatever Tribal severance taxing power may have existed. The congressional intent is "clear from the surrounding circumstances and legislative history" and, accordingly, there is no occasion for invoking the principle of construing ambiguities in favor of Indians. *Bryan* v. *Itasca County*, 426 U.S. 373, 393 (1976).

B. Respondents do not dispute the fact that the federal government has pervasively regulated every aspect of tribal oil and gas leasing, and that under the normal rule applicable to the sovereign states, such regulation would serve to preempt the field. Respondents argue, however, that Indian tribes should be exempted from this normal rule of construction. Yet they cannot logically maintain on the one hand that tribes retain full sovereign powers, and on the other claim exemption from those constraints that curb the lesser sovereigns within the federal system.[26]

The Tribe's tax also conflicts with federal energy policy by impeding oil production from existing wells and sig-

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[25] *See* 1 AIPRC Final Report 174, 181, 347 (1977). The significance of these recommendations is emphasized by the fact that the Commission's Vice Chairman described the Final Report as a "product of one-sided advocacy in favor of American Indian tribes" (1 AIPRC Final Report 571).

[26] The fact that the Indian Reorganization Act grants tribes organized under it the power to issue short-term leases (of less than ten years' duration) is of no consequence, since it is undisputed

nificantly increasing the price of interstate gas and oil. Notwithstanding the trial court's findings (J.A. 130), Respondents attempt to downplay these damaging effects. They claim that if state taxation of energy production does not hamper federal energy policy, then tribal taxation does not either. The short answer to this argument is that Congress, the arbiter of national energy policy, granted states the power to tax petroleum production on Indian lands to the exclusion of any comparable right in Indian tribes. That policy is undercut by Indian severance taxes which adversely impact state severance taxes and production.[27] Moreover, the cumulative burden of state and tribal severance taxes will surely make the extraction of needed resources an increasingly difficult and unpredictable process.

The comprehensive federal regulation and the national energy policy combine with the 1927 Act to divest any Indian severance taxing power that may ever have existed[28]

III. THE TRIBE IS SUBJECT TO COMMERCE CLAUSE RESTRAINTS, AND ITS TAX VIOLATES THE COMMERCE CLAUSE BY PROVIDING A DISCRIMINATORY BENEFIT TO LOCAL INDUSTRY AND IMPOSING A MULTIPLE BURDEN UPON NATIONAL COMMERCE.

Respondents' principal objection to our Commerce Clause claims rests on the contention that tribes in the

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that the Tribe did not seek to exercise that power. *See* our opening brief at 27-28 n. 35. Also, many tribes, including some of the *amici* here (*e.g.*, the Navajos), are not organized under the Indian Reorganization Act.

The preemptive effect of the federal regulatory scheme is treated in depth in the Amicus Brief of Shell Oil Co., *et al.*

[27] *See* note 24, *supra*. The inhibiting combined effect of Indian and state severance taxes is also noted in the Amicus Brief filed herein of Westmoreland Resources, Inc., an appellant in *Consolidated Edison Company* v. *Montana*, No. 80-581, which is being argued with this case.

[28] Nothing in the Natural Gas Policy Act of 1978 supports any other conclusion. *See* note 10, *supra*.

independent exercise of their sovereignty have powers greater than those possessed by the states, and are equivalent to "foreign nations" whose taxing authority is beyond judicial scrutiny. Whatever may be the merit of tribal claims to general sovereign powers over non-Indians, surely this Court should reject the notion, supported by neither precedent nor policy and rejected below,[29] that Indian tribes are unrestrained by the Commerce Clause.

A. The Negative Implications of the Commerce Clause Restrain Tribes as Well as States.

Respondents argue that Indian tribes, unlike the states, are not subject to any negative implications of the Commerce Clause, and that they are to be treated as foreign nations whose taxing statutes cannot be reviewed by this Court. (Sec. Br. 35-40; Jic. Br. 56-57). But this Court long ago squarely rejected the notion that Indian tribes are foreign nations for constitutional purposes. Rather, they are "domestic dependent nations," whose members "are considered within the jurisdictional limits of the United States, [and] subject to many of those restraints which are imposed upon our own citizens." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 11 (1831). *See also United States* v. *Kagama*, 118 U.S. 375, 382 (1886); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565-66 (1903).[30]

The Secretary finds the Tribe's supposed exemption in the language of the Commerce Clause itself. He argues that since the Clause speaks of Congress' power to regulate commerce "*with* the Indian tribes," and "*with* foreign

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[29] Respondents' extreme position was rejected by the Court of Appeals below, which held that "the Commerce Clause . . . of its own force limits the power of the tribes as well as the states." (J.A. 152).

[30] *See also* our opening brief at 32 and n. 41. In 1871, Congress, while preserving existing treaty obligations, determined that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Act of March 3, 1871, 16 Stat. 566.

nations," the Framers must have intended to accord both of these entities similar treatment, and to distinguish Congress' power over them from its power to regulate commerce "*among* the several states." This argument puts unwarranted weight on prepositional choice,[31] and it also is foreclosed both by the refusal of Congress and this Court to treat Indian tribes as foreign nations, and by the very nature of the tribes' wardship status. Since the Clause is the source of Congress' plenary power over Indian affairs, it could be argued with equal logic that its parallel language gives Congress plenary power over foreign nations. That proposition is no more absurd than the notion that Indian tribes are to be treated as "foreign nations" for purposes of the Clause.

Petitioners do not contend that Indian tribes have become indistinguishable from states. But surely for purposes of the Commerce Clause they more closely resemble states than foreign nations, and should be treated accordingly. Like states, they are subject to the superior power of the federal government; and like states, they are specifically named in the Clause and should be subject to its restraints.[32] That the Framers may have intended the

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[31] The Framers chose the phrase "with the Indian tribes" of necessity because no other language encompassed the web of commercial relations that could exist between tribes, the states, and the federal government. The simple preposition "among," which so well served to define all commerce touching the states, would have been inadequate if applied to tribes; and any attempt to delineate all possible permutations of Indian commerce would have detracted from the Clause's grand simplicity. We submit that "with the Indian tribes" was the only language available to the Framers, and that in adopting it, they intended to place within the Clause's domain more than the bilateral relations between tribes and the federal government.

[32] The doctrine that tribes are "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority" (Sec. Br. 36) has no application here. The Commerce Clause is not so framed. Also, its "negative implications" arise from the "general provisions" of the Constitution. As the case establishing the doctrine notes, tribal "powers of local self-government are . . . restrained by the general provisions of the

Commerce Clause to protect the tribes from encroachments by the states[33]—a function which it served in former times and which persists to some extent today—does not detract from its other, overriding purpose of fostering free trade throughout the nation. Nor does the Clause's protective purpose constitute a license to the tribes to impede commerce by means forbidden to the states.[34]

Constitution." *Talton* v. *Mayes*, 163 U.S. 376, 384 (1896). Moreover, we are not dealing here with internal tribal matters such as were involved in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), also cited by the Secretary. Instead, the Tribe's powers are sought to be expanded far beyond "local self-government" and to affect commerce beyond its borders. If the Tribe has the powers it seeks to exercise, they must be exercised within the restraints of the Commerce Clause.

[33] It is true that in the exercise of the territorial attribute of sovereignty, tribes have some power to exclude nonmembers from the reservation, or attach conditions to their entry (Sec. Br. 41; Jic. Br. 57), and thereby restrict commerce, but that power is not unrestrained and it is subject to the superior power of the United States. Neither that attribute nor the protective purposes of the Clause justify exempting tribes whose actions affect commerce beyond their borders from the restraints which bind the states. The same treaties which generally recognize a power to exclude (*see* n. 12, *supra*) also generally recognize that the power is subject to restraint. The treaties commonly acknowledge the authority of the United States to regulate trade with the Indians, and require the tribes to admit persons, such as licensed traders or others holding authority from the United States, to their territory. *See* II Kappler, *supra*, 10, 13, 15-16, 20, 42-43, 226, 228, 230, 233, 235, 237, 240, 242-43, 245, 256, 258-59, 261, 312, 554, 708, 761, 774, 779, 790, 794. These early expressions of national policy foreclose any suggestion that Congress or the Executive has ever recognized any power in tribes to impose burdens beyond those permitted by treaty upon those conducting commerce on the reservation pursuant to federally approved licenses, such as the Petitioners here.

[34] In *Colville* this Court noted the "limited role" the Clause may "play in preventing undue discrimination against, or burdens on, Indian commerce" and stated that it "can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes." 447 U.S. at

The scope of the Clause, and its utility, have grown with the nation. Just as activities once viewed as local are now subject to congressional power under the Clause, *see, e.g., Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970); *Wickard* v. *Filburn*, 317 U.S. 111 (1942); so too, its negative implications now restrain not only states but local governments as well. *See Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951). Indeed, the Commerce Clause would serve little purpose today if it barred only states from obstructing commerce while permitting municipalities, or other political entities, to cause the same damage.[35]

In an age in which national commerce is an organic and interdependent unit, it makes neither constitutional nor common sense to treat Indian tribes, living among us and subject to the supremacy of the national government, as though they were foreign nations on the other side of the globe and free to do what states may not.[36] If the grand purpose of the Clause is to be achieved, tribes which take actions affecting interstate commerce must

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157. Similarly, we submit, it can no longer be seriously argued that the Tribes are unrestrained by the force of the Commerce Clause.

[35] The Brief for the United States as Amicus Curiae in No. 80-581, *Commonwealth Edison Company* v. *Montana*, notes the evolving nature of the Clause and states (p. 23) that there is "no reason why, in appropriate cases, the 'negative implication' of the Commerce Clause cannot likewise reach activities formerly regarded as peculiarly 'local' in nature." We submit that this is such a case.

[36] The "political question" doctrine cannot be invoked to avoid the restraints of the Commerce Clause (*cf.* Sec. Br. 39). The Court is being asked to review a tribal ordinance, not the action of a coordinate branch of the federal government. Just as state statutes are not immunized by the political question doctrine, *see Baker* v. *Carr*, 369 U.S. 186, 210 (1962); so, too, with tribal ordinances. Moreover, the Secretary's argument rests on the erroneous premise that the political departments have "not seen fit to disagree" with the Tribe's severance tax. As shown in Part II, *supra*, and at pp. 15-23 of our opening brief, the Act of March 3, 1927 precludes Indian severance taxes.

be subject to the same negative implications which prevent the states from interfering with the free flow of commerce.[37]

B. The Jicarilla Tax Is Discriminatory.

Respondents' contention that the Jicarilla tax is not discriminatory is contradicted by the plain language of the Tribe's taxing Ordinance, and of the accompanying "instructions to lessees." (J.A. 33-37). If the Tribe had intended, as Respondents assert, to impose a nondiscriminatory tax on all production, whether retained on the Reservation or transported off prior to sale, the Ordinance should have been patterned after the New Mexico severance taxes, or any of the other state taxing statutes cited by the Tribe (Jic. Br. 52). The New Mexico statutes tax production "severed and saved" within the state and make clear that "the taxable event is the sale, transportation out of New Mexico, or consumption of the [mineral product], whichever first occurs." The Tribe chose instead to tax production which has been "severed, saved and *removed from Tribal lands*" and "sold or transported *off the Reservation.*" (J.A. 38-39) (emphasis supplied). The intent and effect of this taxing Ordinance are discriminatory.

Respondents also misread (Jic. Br. 61; Sec. Br. 42) this Court's decisions exempting the wholly proprietary activities of state governments from the restraints of the Commerce Clause. *E.g., Reeves, Inc.* v. *Stake*, 100 S.Ct. 2271 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Those cases draw a fundamental distinction between the activities of states as market regulators and states as market participants; although the former are circumscribed by the Commerce Clause, the latter are not. *See Reeves, Inc.* v. *Stake, supra* at 2277. Petitioners acknowledge that tribes, like states, are free to operate tribal enterprises on the same terms available to any other market participant—buying and selling their petroleum products from whom they please at the

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[37] The American Indian Policy Review Commission reached this same conclusion. *See* 1 AIPRC, *Final Report* 180.

price of their choice. But just as states are barred from exercising their regulatory and taxing powers in a discriminatory fashion, so too, the Jicarilla may not use any *sovereign* power to reap benefit for their own constituents at the expense of nonmembers. This is true regardless of whether the intended beneficiary of their discriminatory taxing policy is a proprietary enterprise maintained by the Tribe or a private industry operating on the Reservation.[38]

C. The Tribal Ordinance Violates the Commerce Clause Because It Taxes an Activity Which Is an Integral Part of the Flow of Commerce.

The Secretary and the Tribe have no answer to this argument. The Secretary's response (Sec. Br. 40-43) is limited to a repetition of his earlier argument (Sec. Br. 35-40) to the effect that Commerce Clause restraints are inapplicable to Indian tribes. The Tribe, on the other hand, argues (Jic. Br. 53-55) that the incidence of the tax is a "local activity" outside the reach of the Commerce Clause.[39] But the incidence of the Jicarilla severance tax is clearly not "severance," but sale or transportation of the severed products off the Reservation. The tax is levied upon the entire volume of production so sold or transported, and is not apportioned according to the length of the pipeline facilities or percentage of the lessees' business taking place on, and off, the Reservation. By the very language of the Ordinance and in practical effect, the tax must be invalidated as a direct, unapportioned levy on an integral portion of interstate commerce. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S.

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[38] The fact that no such benefitted industry yet exists is of no consequence. The Tribe has already announced plans to develop industries on the Reservation that will receive the discriminatory benefits of their tax. *See* our opening brief at 34 n.44. In any event, the tax' potential effects upon commerce must be weighed in determining its validity. *See Nippert* v. *City of Richmond*, 327 U.S. 416, 424 n. 9 (1946).

[39] The Tribe relies on the "mechanical test" of *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922), which the Solicitor General agrees can no longer immunize severance taxes from Commerce Clause scrutiny. *See* n. 35, *supra*.

157 (1954), as construed in *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734, 749 n.18 (1978).

D. The Jicarilla Tax Imposes a Multiple Burden Upon Commerce.

Respondents also err in contending that the Commerce Clause permits parallel taxing authorities in geographically overlapping areas to impose multiple burdens upon interstate commerce. Contrary to Respondents' suggestion (Jic. Br. 68; Sec. Br. 19), *Colville* does not support that position. Apart from the significant differences between the cigarette tax upheld in *Colville* and the severance tax at issue here,[40] the Court in *Colville* neither decided nor even considered whether tribal taxation violates the Commerce Clause. Indeed, the only reference in that opinion to the Commerce Clause was the Court's curt rejection of the outlandish contention that the Indian Commerce Clause of its own force prohibits *state* taxation of cigarettes. 447 U.S. at 157.

Respondents' attempts to liken the Jicarilla tax to a federal severance tax (Sec. Br. 45) are baseless. Although dual taxation by state and federal governments may be "a fact of modern life," (Jic. Br. 68), multiple taxation by states and tribes is not. Such "double taxation" by states and the federal government exists within the traditional framework of hierarchical sovereignty established in the Constitution, in which the powers of municipalities are derived from and subject to the sovereignty of the states, whose powers in turn are subject to the paramount sovereignty of the United States. If the tax of one jurisdiction interferes with the tax of another, that of the lesser sovereign must yield. *See Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 77 (1869). If the lesser sovereign's tax is allowed to continue, it does so in accordance with the wishes of its own constituents, and at the sufferance of the greater sovereign.

Dual taxation by tribes and states is an entirely different matter. The relationship between the two is not

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[40] *See* our opening brief at 8-10.

hierarchical. Both the Tribe and the state attempt to assert parallel but independent taxing authority.[41] Both are subject to the supremacy of the federal government. The Jicarilla could no more abrogate New Mexico's severance tax than could Arizona or Wyoming.

There is another crucial difference between the Jicarilla severance tax and one imposed by the United States. Non-Indians subject to the Jicarilla tax are barred under all circumstances and for all time from voting to modify or rescind the Ordinance. It is no answer to say, as Respondents do (Jic. Br. 70; *cf.* Sec. Br. 38-39), that nonmembers forced to pay both tribal and state severance taxes are free to petition the federal government for relief. If this indirect recourse were sufficient to validate an otherwise impermissible tribal ordinance, then by a parity of reasoning, states would be free to impose multiple burdens upon residents of sister states, on the theory that the victims are in any event free to petition Congress to act. Yet we know that states may not justify dual taxation on this basis.[42] Just as the failure of Congress to overrule a particular taxing scheme, whether tribal or state, cannot be construed as an endorsement of it, so too, the availability of an ultimate, congressional remedy for the taxpayer cannot justify the imposition of dual taxation by lesser sovereigns, much less by Indian tribes; this Court remains "the final arbiter of the competing demands" involved in such circumstances.[43]

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[41] By contrast, federal and state taxing authority is both vertical (i.e., hierarchically arranged) and interrelated.

[42] This Court long ago rejected the claim that the existence of Congress' affirmative power to regulate commerce among the states frees them from Commerce Clause restraints when Congress has not acted. *See, e.g., Wickard* v. *Filburn*, 317 U.S. 111, 121 (1942). *See also* Brown, "The Open Economy: Justice Frankfurter and the Position of the Judiciary," 67 Yale L.J. 219, 221-222 (1957).

[43] *See Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 454 (1979); *see also* our opening brief at 30 and Sec. Br. at 36.

It is also our position that Congress has precluded any Indian severance taxing power. *See* Part II, *supra* and our opening brief at 42 n. 52.

The Tribe's tax, when coupled with New Mexico's severance tax, constitutes an impermissible, multiple burden on the flow of commerce,[44] and for that reason is invalid [45] as discussed at pp. 39-43 of our opening brief.

CONCLUSION

For the reasons stated here and in our opening brief, the decision below should be reversed.

Respectfully submitted,

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[44] Whether that burden is borne entirely by Petitioners or is "passed on" to their customers is of no constitutional significance (*see* Jic. Br. 65). The tribal tax is prohibited because it burdens *commerce*, not because its burden is excessive or because a disproportionate share of it falls upon particular persons or industries.

[45] Even if the tax is found to be within the Tribe's power, not preempted, not discriminatory, and not a multiple burden, it may still be prohibited if not "fairly related" to services provided by the Tribe, under standards to be elucidated by this Court in *Commonwealth Edison Co.* v. *Montana*, No. 80-581. The difficulties feared by the Solicitor General in applying the "fairly related" test to a state's severance tax (Brief for United States as Amicus Curiae in *Commonwealth Edison*, p. 1) will be compounded immeasurably if this Court allows Indian tribes to levy severance taxes.

APPENDIX

LISTING PURSUANT TO RULE 28.1

Listing Pursuant to Rule 28.1

The following is the listing of parents, subsidiaries, and affiliates of petitioners pursuant to Rule 28.1.

A. *Petitioner Amoco Production Company*

Standard Oil Company (Indiana)
Amoco Canada Petroleum Company, Ltd.
Amoco Credit Corporation

Amoco International Finance Corporation
Amoco Oil Holdings S.A.
Amoco Pipeline Company

Analog Devices
Cetus Corporation
Cyprus Mines Corporation

Amoco (U.K.) Exploration Company
Cyprus Anvil Mining Corporation

Solarex Corporation

B. *Petitioner Marathon Oil Company*

Alaska Transportation Service Co.
Alsip Motel Partnership
American Minerals Company
Anspar Petroleum Corporation
Arbeitsgemeinschaft Steinkohle
Artic L&G Transportation Company
Atlantic Nickel Mines Ltd.
Automotive Fuel Corporation
Automotive Fuel Corporation of Delaware, Inc.
Badger Pipeline Company
Bluffton Community Hospital Corporation
Bonded Oil Co.
Bonded Propane
Bonded Stations, Inc.
Bonded Supply Co.
Borealis Exploration Ltd.

Bosart Company
Cairn Petroleum Ltd.
Canadian Australian Petroleum No Liability
Carriage Creek Inc.
Cavalier Petroleum Company of Cuba
Cheker Oil Company
Cheker Oil Company of Delaware, Inc.
Cheker Oil Company of Florida, Inc.
Cheker Oil Company of Indiana, Inc.
Cheker Oil Company of Michigan, Inc.
Cheker Oil Company of Ohio, Inc.
Cheker Oil Company of Wisconsin, Inc.
City Point Oil Terminal, Incorporated
CLAM Petroleum Company
Clean Seas, Inc.
Coastal Plains Oil Company
Compania Iberica Refinadora de Petroleos, S.A.
Compania Mineral Marathon, Ltd.
Consolidated Stations Incorporated
Cook Inlet Pipe Line Company
Cope Petrolera S.A.
Deutsche Marathon Explorations GmbH
Deutsche Marathon Petroleum GmbH
Deutsche Transalpine Olleitung GmbH
Domex Packaging Ltd.
Dor Rae Realty Ltd.
Dyer Industrial Park
Dynamic Petroleum Products, Inc.
East Texas Salt Water Disposal Co.
ECOL Inc.
Equadorian Offshore Corporation
Elk Water Users Association
Emro Land Company
Emro Marketing Company
Emro Propane Company
Explorer Pipeline Company
Express Oil Company

Farmers Union Central Exchange, Inc.
Federal's Inc.
Findlay Aviation Services, Inc.
Fractionation Research, Inc.
Frontier Resources, Inc.
Frontier Spar Corporation
Fuelgas Company, Inc.
Gastown, Inc. Delaware
Globe Oil Company, U.S.A.
Gravcat, Inc.
Greater Muskegon Industrial Fund, Inc.
Green Bay Terminal Corporation
(H.M. Pan Ocean-Syracuse Oil S. Africa
(proprietary) Limited)
The Harrison Township Telephone Co.
Hancock Shipping Company Limited
Hare & Company
Holden Fuel Oil Corporation
Indonesian Enterprises, Inc.
International Petrodata, Inc.
Interocean Oil Colombia, Inc.
Interocean Oil Company, Inc.
Interocean Oil Development Company (Nigeria)
Interocean Oil Exploration (Nigeria)
Kansas-Nebraska Gas Service, Inc.
Kenai Lng Corporation
Key Pipe Line Co., Ltd.
Knoll Glass Service, Inc.
Lafayette Parking, Inc.
Lee Oil Corporation
LOCAP Inc.
LOOP Inc.
Magnorth Petroleum Ltd.
Manaheim Terminal and Warehousing Service
Company
Marathon Chemical Company
Marathon Energy, Ltd.

Marathon Estanola de Petroleos, S.A.
Marathon Exploration Tunisia, Ltd.
Marathon Financial Company
Marathon Financial Corporation
Marathon Insurance Bureau
Marathon International Finance Company
Marathon International Oil Company
Marathon International Petroleum (G.B.) Limited
Marathon International S.A.
Marathon Mining Ireland, Ltd.
Marathon Oil Company (a Delaware corporation)
Marathon Oil Company (an Ohio Corporation)
Marathon Oil Foundation, Inc.
Marathon North Sea (G.B.) Limited
Marathon Oil Overseas Finance N.V.
Marathon Oil U.K., Ltd.
Marathon Petroleum Amazonas, Ltd.
Marathon Petroleum Argentina, Ltd.
Marathon Petroleum Australia, Ltd.
Marathon Petroleum Bolivia, Ltd.
Marathon Petroleum Brasul, Ltd.
Marathon Petroleum Brazil, Ltd.
Marathon Petroleum Burma, Ltd.
Marathon Petroleum Canada Ltd.
Marathon Petroleum Colombia, Ltd.
Marathon Petroleum Company
Marathon Petroleum Company (Ireland) Limited
Marathon Petroleum Ecuadoran, Ltd.
Marathon Petroleum Egypt, Ltd.
Marathon Petroleum Exploration Ltd.
Marathon Petroleum (G.B.) Limited
Marathon Petroleum Germany, Ltd.
Marathon Petroleum Guatemala, Ltd.
Marathon Petroleum Honduras, Ltd.
Marathon Petroleum Indonesia, Ltd.
Marathon Petroleum Ireland, Ltd.
Marathon Petroleum Irian Jaya, Ltd.

Marathon Petroleum Italy, Ltd.
Marathon Petroleum Kenya, Ltd.
Marathon Petroleum Libya, Ltd.
Marathon Petroleum Natuna, Ltd.
Marathon Petroleum Netherlands, Ltd.
Marathon Petroleum Netherlands Antilles, Ltd.
Marathon Petroleum Norte Brazil, Ltd.
Marathon Petroleum North Sea (G.B.) Limited
Marathon Petroleum Norway, Ltd.
Marathon Petroleum Pakistan, Ltd.
Marathon Petroleum Paraguay, Ltd.
Marathon Petroleum Peru, Ltd.
Marathon Petroleum Philippines, Ltd.
Marathon Petroleum Santo, Ltd.
Marathon Petroleum Siri, Ltd.
Marathon Petroleum Spain, Ltd.
Marathon Petroleum Sri Lanka, Ltd.
Marathon Petroleum Syria, Ltd.
Marathon Petroleum Thailand, Ltd.
Marathon Petroleum Tunisia, Ltd.
Marathon Petroleum Turkey, Ltd.
Marathon Petroleum U.K., Ltd.
Marathon Petroleum Venezuela, Ltd.
Marathon Petroleum Viet-Nam, Ltd.
Marathon Pipe Line Company
Marathon Pipe Line Company (a Nevada corporation)
Marathon Property Finance, Inc.
Marathon Refining Company
Marathon Resources, Inc.
Marathon Service Company
Marathon Services (G.B.) Limited
Marathon Trading and Shipping Company
Mebane Oil Company
Michigan Tankers, Inc.
Mid-Wood, Inc.
Mill City Petroleum

Mountain Fuel Supply Company
Muesing, Inc.
Mustang Petroleum Company
New Continental Oil Company
Oasis Oil Company of Libya, Inc.
Ocean Oil Company N.L.
Ohio Oil Company
Oil Companies Institute for Marine Pollution Compensation, Ltd.
Oil Insurance Limited
Oil Shippers Service, Inc.
Oklahoma Oil Co.
Pan Ocean de La Republica Dominicana Ltd.
Pan Ocean Energy Company
Pan Ocean Exploration, Inc.
Pan Ocean Niger, Ltd.
Pan Ocean Oil (Canada), Ltd.
Pan Ocean Oil Corporation
Pan Ocean Oil Corporation (Abu Dhabi)
Pan Ocean Oil Corporation (Equador)
Pan Ocean Oil Corporation (Indonesia)
Pan Ocean Oil Corporation (Maldive Islands)
Pan Ocean Oil Corporation (Nigeria)
Pan Ocean Oil Corporation (North Sea)
Pan Ocean Oil Corporation (Norway)
Pan Ocean Oil Corporation (Thailand)
Pan Ocean Oil Ltd.
Pan Ocean Oil Norge A/F
Pan Ocean Petroleum Netherlands, Ltd.
Pan West Pty. Limited
Parkersburg Mutual Telephone Co.
Petemco, Inc.
Petroleum Terminals, Inc.
Petroleum Terminals, Incorporated
Pilot Oil Corporation
Platos Properties, Inc.
Platte Pipe Line Company

Polar LNG Corporation
Polar LNG Shipping Corporation
POOC Caribbean Oil Finance N.V.
POOC International Oil Finance, N.V.
POOC Overseas Exploration and Development B.V.
Pooled Resources Investing in Minority Enterprises, Inc.
Port Oil Inc.
Pritchard Oil Company
Product Terminals, Inc.
P.V. Commodity Systems Ltd.
P.V. Container Systems Ltd.
Qualbank, Inc.
Redwater Water Disposal Company Limited
Russell Stewart Oil Company
Ryukyu Exploration Co., Ltd.
Sage Creek Coal Limited
San Francisco Foundation
Saratoga Minerals, Ltd.
Sidon Canal Co.
Societa Italina Per L'Oleodotto Transalpino, S.p.A.
Southern Ventures Pty.
Speedway Oil Company of Canada, Limited
Speedway Petroleum Corporation
Syracuse Oils Norge N/S
Texas-Alberta Oil Corporation
Transalpine Finance Holdings S.A.
Transalpine Olleitung Nosterreich GmbH
U-Save, Inc.
Walvis Bay Oil and Gas Ltd.
Webster Service Stations, Inc.
Westshore Pipe Line Company
Wolverine Pipe Line Company
Women's Professional Softball Club of Chicago, Inc.
Woodford Oil and Gas Ltd.
Wyoming Industrial Development Corporation

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